



December 6, 2001

Mr. Ronald D. Stutes
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2001-5697

Dear Mr. Stutes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155171.

The City of McKinney (the "city"), which you represent, received a request for "all documentations relating to the sewage spill" on a specified tract of land. You explain that you have released "a significant number of documents" to the requestor, but that you are seeking to withhold Exhibits "B" and "D" from disclosure under sections 552.103, 552.105 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Because it is the most comprehensive of your asserted exceptions, we will address your section 552.103 argument first. To show that section 552.103(a) is applicable, the city must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W. 2d 479, 481 (Tex. App. - Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W. 2d 210, 212 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

The city explains that on July 15, 2000, a sewage spill occurred on a privately-owned tract of land in the northern portion of the city. The landowner has made a claim against the city for damages due to the sewage spill. It is the city's belief that two private entities may be responsible for the spill and resulting damages. The requestor is an attorney representing one of these private entities. You inform us that the city has engaged in settlement negotiations during the past year with the landowner and his attorney, as well as with the two private

entities and their attorneys. You state that negotiations, including negotiations for the possible purchase of the subject tract by the city, are currently in progress, no conclusion has yet been reached and that "not only is litigation reasonably anticipated between the City and the client of the requestor, it is also reasonably anticipated to arise between the City" and the landowner as a result of the sewage spill. Based on the foregoing, we conclude that the city reasonably anticipated litigation on the date the city received the request for information. We additionally find that the submitted documents relate to the reasonably anticipated litigation for purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W. 2d at 483.

We note, however, that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Because it is clear that the opposing party has seen or had access to some of the responsive information, the city can have no section 552.103 interest in those documents. Thus, we have marked the documents that may be withheld under section 552.103.¹ As for the remaining documents, we will address your other claimed exceptions.

You also assert that the submitted information is excepted from disclosure by section 552.105 of the Government Code. Section 552.105 excepts from required public disclosure information relating to "(1) the location of real or personal property for a public purpose prior to public announcement of the project" as well as "(2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Section 552.105 protects a governmental body's planning and negotiating position with respect to competitive purchasing transactions. See Open Records Decision No. 564 at 2 (1990). A governmental body may withhold information the release of which would impair or tend to impair the governmental body's "planning and negotiating position in regard to particular transactions." Open Records Decision No. 222 (1979). For example, this office has concluded that appraisal information about parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. *Id.*

When a governmental body has made a good faith determination that the release of information would damage its negotiating position with respect to the acquisition of property, the attorney general in issuing a ruling under section 552.306 will accept that determination unless the records or other information show the contrary as a matter of law. Open Records Decision No. 564 (1990). Upon review of the city's arguments and the submitted information we find that the city has not demonstrated how the release of the remaining information would damage the city's negotiating position with respect to the purchase of the property. Accordingly, the remaining information may not be withheld from required public disclosure under section 552.105 of the Government Code.

¹The applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, you have asserted that the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107 does not except purely factual information from disclosure. *Id.* You have argued that release of a portion of the submitted documents would "deprive the City of full and free access to legal counsel." However, because the remaining documents were either prepared by opposing counsel or were provided to the opposing party, the city has not demonstrated that these documents contain confidential attorney-client communications. *See* Tex. R. Evidence 503 (a)(5) (defining "confidential communication" as a communication that is not intended to be disclosed to third parties); *see also* Open Records Decision No. 630 at 4 (1990) (governmental body may waive section 552.107(1)). Thus, the city may not withhold the remaining submitted documents under section 552.107.

In summary, the city may withhold under section 552.103 the documents we have marked. The remaining information, however, must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Gregory T. Simpson
Assistant Attorney General
Open Records Division

GTS/sdk

Ref: ID# 155171

Enc. Submitted documents

c: Mr. David J. LaBrec
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(w/o enclosures)